Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the Cable	)	
Television Consumer Protection and	)	MM Docket No. 93-8
Competition Act of 1992	)	
	)	
Home Shopping Station Issues	)	

Opposition of the National Association of Broadcasters to Petition for Reconsideration

The National Association of Broadcasters ("NAB")[1] submits this opposition to the Petition for Reconsideration of the Commission's *Report and Order* in this proceeding filed by the Center for the Study of Commercialism ("CSC"). The CSC petition rests on an insupportable view of the Commission's obligations under Section 614(g) of the Communications Act and of the role of commercial programming in providing service to the public.[2]

The Commission's Analysis Complied With Section 614(g)

CSC's central argument is that the Commission erred in failing to consider whether a home shopping format serves the public interest, regardless of what other public service

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1 NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry.

2 NAB will not address CSC's complaints that the Commission improperly considered certain *ex parte* letters submitted demonstrating the value of home shopping programming. We note, however, CSC's suggestion that the Commission should not place great weight on letters "so obviously generated by an organized campaign." Petition at 8-9. If the Commission should not consider the views of parties whose participation may have been stimulated by other parties in this proceeding, it might also wonder about the extent to which the views expressed in CSC's filings were arrived at independently of its counsel.

programming is carried on stations with that format. CSC argues that the Cable Act required the Commission to make such a determination. The plain language of the Act demonstrates a different congressional intent.

The Cable Act required the Commission to determine whether "broadcast television *stations* that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity" (emphasis added). The statute thus very clearly directed the Commission's attention to the question of whether these stations were serving the public interest in their overall activities, not just whether certain programming on those stations met a public interest test. Where the language of a statute is clear, there is no need to resort to legislative history. *See United States v. Oregon*, 366 U.S. 643, 648 (1961).[3] Had Congress' intention been otherwise, the statute could easily have been drafted to make clear that it was home shopping *programming* in particular that should be the Commission's focus. Not only is the statute not drafted in that manner, such a direction would have been entirely at odds with the Commission's consistent focus on the public service rendered by a station overall, rather than the merits of one particular type of programming.

CSC's argument (Petition at 4) that the Congress could not have intended the Commission "to examine whether 4½ minutes of non-sales programming per hour served the public interest" incorrectly assumes that Congress knew how much and what type of non-sales programming is aired by stations with home shopping formats. How Congress was to have arrived at such a conclusion is unknown since it held no hearings on this issue. Instead, this proceeding was mandated, among other things, to establish a record to

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[3] Nonetheless, the conference report is to the same effect, consistently discussing the public service of *stations*, rather than *programs*, as the question which the Commission will address. H. REP. NO. 862, 102d Cong., 2d Sess. 74-75 (1992). The colloquy cited by CSC to a different effect cannot be viewed as controlling since it is contrary to both the plain language of the statute and the report of the conference committee which drafted the statute.

establish how much non-shopping programming is aired by stations with a shopping format. Since Congress directed the Commission to make that inquiry, it cannot be assumed to have reached any *a priori* conclusion about whether shopping stations are serving the public interest.

Indeed, CSC's repeated suggestion that the Commission's decision that stations with home shopping format meet their public interest obligations through only 4½ minutes of non-sales programming is belied by the Commission's identification of the 4½ minute program aired by Silver King Communications as its "principal" public interest program, but not its only such program. *Report and Order* ¶ 29. Silver King, the Commission noted, also airs four hours of non-entertainment programs each Sunday, programming which CSC entirely ignores, as it does evidence cited by the Commission of home shopping stations offering such unique public services as nightly Chinese-language news and public affairs programming. *Report and Order* ¶ 35.

CSC further errs in its argument that, had the Commission examined the public interest in home shopping programming alone, it could not have found that stations with that format serve the public interest. CSC relies for this argument entirely on Commission opinions which preceded the decision in *Television Deregulation*, 98 FCC 2d 1076 (1984), *recon.*, 104 FCC 2d 358 (1986), *aff'd in relevant part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), in which the Commission removed all limits on the amount of commercial time on television stations. Because the Cable Act specified that the Commission should reach a decision in this inquiry "notwithstanding prior proceedings," neither the *Television Deregulation* decision, nor the contrary opinions relied on by CSC, bind the Commission in this inquiry. Again, had Congress intended the Commission to make its decision disregarding only one particular earlier proceeding, it could easily have so specified. Since Congress did not do so, the Commission correctly determined that CSC cannot selectively determine which Commission precedent should be deemed binding, and which should not. *Report and Order* ¶ 25

n. 75. The Commission instead concluded that stations with home shopping formats are serving the public interest based on the record in this proceeding and on the criteria set out in the Cable Act.

CSC also argues (Petition at 9-11) that the Commission erred in concluding that it should consider only alternative broadcast demands for the spectrum used by home shopping stations, relying on a *post hoc* letter from Congressman Dingell. CSC does not explain how the Commission erred in concluding that the statute did not permit it to consider non-broadcast spectrum uses. Since the statute directs the Commission, in the event that it found that one or more home shopping stations did not operate in the public interest, to provide an opportunity for those stations to develop other *broadcast* uses, the relevance of the inquiry CSC proposes is unclear. Assuming that the Commission had considered non-broadcast demands for the varying channels occupied by home shopping stations and concluded that those non-broadcast uses would serve the public interest more than shopping stations, the only remedy open to the Commission would have been to direct the licensees of those stations to adopt a different broadcast format. The Commission correctly declined to read the statute as requiring such an empty inquiry.[4]

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[4] CSC (Petition at 11-13) also criticizes the Commission for addressing whether home shopping stations should be denied a renewal expectancy. CSC's complaint is difficult to understand since the Commission was addressing an issue raised by CSC itself. *Report and Order* ¶ 36. CSC's request that the Commission deny home shopping stations a renewal expectancy could only have been construed to ask for that action if the Commission otherwise concluded that those stations are operating in the public interest because the statute specifically directed the Commission not to deny any station a renewal expectancy because its programming was not found to serve the public interest. CSC's claim that there is a distinction between denial of renewal expectancy because of a station's format and a denial *solely* due to that format is pure sophistry. If, in connection with a particular renewal, evidence is presented to the Commission that a station is not serving the public interest, nothing in the *Report and Order* would preclude the Commission from considering whether that station deserves a renewal expectancy. CSC can ask for no more.

CSC's Concerns About "Overcommercialization" Should Not be Considered in this Proceeding

As discussed above, the Commission correctly concluded that the Cable Act required it to determine whether home shopping stations meet the Commission's public interest requirements. Thus, it properly considered the three factors identified by Congress as relevant to that decision. CSC's argument that, regardless of what other non-entertainment programming is aired on a station, the choice of a shopping format should be found inconsistent with the public interest, is not relevant to that inquiry, and there was no need for the Commission to address that question in this proceeding.

There are additional reasons why CSC's request that the Commission take that issue up now should be denied. First, at its September 23, 1993 meeting, the Commission adopted a notice of inquiry covering the precise question that CSC seeks to raise — whether the amount of time a station devotes to commercial messages should be regulated. Mass Media Action, *Commission Initiates Inquiry Regarding Limitations on Commercial Time on Television Broadcast Stations* (Sept. 23, 1993). Since CSC and all other interested parties will have a full opportunity to present their views on whether commercialization limits are appropriate in that proceeding, it would be better for the Commission to deal with that issue there, rather than in this proceeding where the *Notice of Proposed Rule Making* did not give any notice that the Commission would undertake such a broad reconsideration of its *Television Deregulation* decision.

The CSC petition also rests on an assumption that programming that describes a product or a commercial transaction is *ipso facto* less valuable and serves only limited private interests. That assumption is entirely unwarranted. When Congress adopted a system of privately owned broadcast stations, it perforce accepted the inclusion of commercial programming as the way to pay for that system. Since the revenues derived from carriage of commercial speech make it possible to produce and transmit the non-

entertainment programming that CSC views as in the public interest, the commercial speech itself must be regarded as advancing the public interest.

There is also a substantial public interest in the carriage of information about products and commercial transactions on broadcast stations. The existence of the free market on which the American economy rests depends on the availability of a free flow of information about goods and services which consumers can use to make an informed choice. *See Morales v. TVA*, 112 S. Ct. 2031 (1992); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976). Accordingly, the courts have recognized a right to disseminate truthful information needed for consumers to make informed decisions on products and services. *See, e.g., Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *Linmark Associates, Inc. v. Borough of Willingboro*, 431 U.S. 85 (1977). Thus, commercial programming cannot be viewed as inherently a less important or less desirable category of programming on television stations.

Indeed, the programming of home shopping stations demonstrates the value which commercial programming may have. The success of home shopping programming confirms that the providers of home shopping services have created an efficient means of product distribution which is obviously valued by the public. Home shopping stations provide consumers in rural areas without access to other national discount distributors with goods at competitive prices, and thus provide competition to local retailers. In addition, the home shopping format often includes information about products and the factors which consumers should consider in making a decision on such matters as the best type of personal computer. Consumers who watch such programming benefit, whether or not they make a purchase from the home shopping station. The CSC petition wholly ignores all of these factors. The Commission, however, cannot uncritically accept CSC's judgment that all commercial programming is of no value to the public, but instead must conclude that commercial speech on television stations is an appropriate part of the mix of services which television stations provide.

Conclusion

For the foregoing reasons, the Commission should deny CSC's request for reconsideration of its decision finding that stations with home shopping formats serve the public interest.

Respectfully submitted,

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Certificate of Service

I, Karen Koon, hereby certify that I have, this 30th day of September, 1993, caused to be sent by mail, first class postage prepaid, copies of the foregoing "Opposition of the National Association of Broadcasters to Petition for Reconsideration" to the following:

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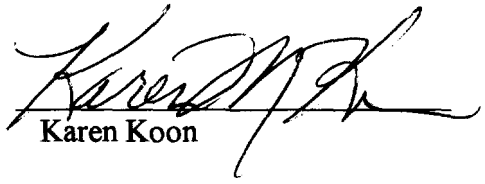

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